

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-7292 76-7450
76-7391 76-7466
76-7506 76-7485
76-7449 76-8240

NO. 76-7292

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM
and WILHELMINA P. SEALES, JOHN MEDIGE, and
the CITIZENS COUNCIL FOR HUMAN RELATIONS,
INC. and NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, BUFFALO
BRANCH,

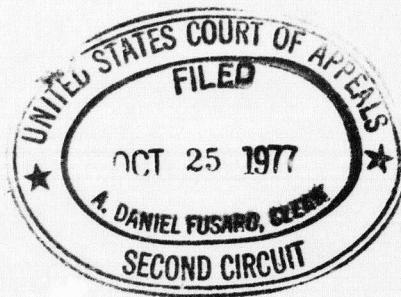
Appellees,

-against-

EWALD B. NYQUIST, Individually and as
Commissioner of Education of the State of
New York, THE BOARD OF REGENTS OF THE STATE
OF NEW YORK, THEODORE M. BLACK, CARL H.
PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR.,
JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK,
HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN
I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM
JOVANOVICH, MARY ALICE KENDALL, JORGE L.
BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL
and LAURA BRADLEY CHODOS (Individually and
as Members of the Board of Regents of the
State of New York), JOSEPH MANCH, Individually
and as Superintendent of Schools of the City
of Buffalo, EUGENE T. REVILLE, Individually
and as Superintendent of Schools of the City
of Buffalo, THE BOARD OF EDUCATION OF THE
CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E.
SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON,
DR. MATT A. GAJEWSKI, LOUIS C. BENTON,
MICHAEL J. RYAN, JOSEPH D. HILLERY and
MARILYN P. KAVANAUGH (Individually and as
Members of the Board of Education of the City
of Buffalo), STANELY M. MAKOWSKI, Mayor of
the City of Buffalo, and DELMAR L. MITCHELL,
RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W.
SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA,
MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K.
ARTHUR, RICHARD F. OKONIEWSKI, HORACE C.
JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO,
DANIEL J. HIGGINS and WILLIAM A. PRICE,
constituting the members of the Common Council
of the City of Buffalo,

Appellants.

Appeal from the United States District Court
for the Western District of New York.



* PLEASE RETURN TO *
* RECORDS ROOM *

REPLY BRIEF ON BEHALF OF APPELLANTS
NYQUIST, BOARD OF REGENTS, BLACK,
PFORZHEIMER, ALLAN, CLARK, NEWCOMB,
BATISTA AND CHODOS

Statement

This brief is filed in reply to arguments raised by plaintiffs-appellees in their brief, served October 11, and not considered in the main brief of these defendants-appellants.

ARGUMENT

POINT I

THE STATE DEFENDANTS MUST BE HELD RESPONSIBLE FOR SCHOOL DISTRICT SEGREGATION IN BUFFALO, IF AT ALL, SOLELY ON THE BASIS OF THEIR OWN ACTS AND NOT THOSE OF THE CITY.

Appellees contend in their brief that, because the City of Buffalo is a political subdivision of the State, the State defendants are derivatively responsible for any segregative acts by the City of Buffalo, citing Milliken v. Bradley (418 U.S. 3112 [1974]). That case does not support plaintiffs' contention, however. Chief Justice BURGER's opinion referred to the District Court's holding of derivative liability and then said "Accepting, arguendo, the correctness of this finding * * *". That sentence does not constitute a holding by the Supreme Court that that finding was correct, either in law or fact. Indeed, accepting that finding only for the sake of argument, the Court rejected the inter-district remedy which the District Court had imposed.

The function of the Board of Regents is legislative in nature - the making of educational policy. It is not the day by day administration of the schools. The policy adopted by the Regents has been for not only racial integration in the schools, but also racial balancing, a policy beyond that which is constitutionally required.

Insofar as the Regents are concerned, no acts of the Board as a whole, nor of the individual members, have been shown demonstrating a segregative intent. Certainly, findings of the District Court to the contrary are "clearly erroneous" (Rule 52, Fed. Rules Civ. Pro.).

The Commissioner of Education, appointed by the Regents, serves in both an administrative and quasi-judicial capacity. It was in the latter capacity that former Commissioner Allan handed down the 1965 ruling directing the City of Buffalo to racially balance its schools - the historic origin of this action. It is significant, also, that that 1965 proceeding involved in part the racial composition of Woodlawn Junior High School. Significant, because of paragraph 141 of the stipulation, referred to in appellees' brief at page 46, which was based on a misunderstanding of facts, the actual facts were demonstrated at the trial by appellees' own witnesses. The Regents do not approve the siting of school buildings, nor does the Commissioner of Education with reference to attendance zones. As a matter of fact, the Commissioner has the power to approve school building plans but does not do so

for the State's largest cities. Irrespective of that, appellees' evidence clearly demonstrated that the problem with Woodlawn was not its siting - it could have been an integrated school - but rather the attendance zone drawn for it by the school board, which was not subject to approval by the Commissioner of Education.

In New York, political subdivisions, including school districts, are possessed of substantial autonomy. The Commissioner of Education is not the day by day administrator of the schools. While he has considerable supervisory powers, he does not have the authority to interject himself as a school district administrator. Local boards of education are either elected locally or appointed by local governing bodies, not by the Commissioner of Education. It is those boards which have the principal power and authority to administer the schools.

In the instant case, the record is clear that at one point integration plans were proposed by the Buffalo Board of Education and approved by the Commissioner which would have effectively integrated the schools, but that those plans were frustrated by acts of the Buffalo Common Council - over which body neither the Commissioner nor the Regents has any power whatsoever.

For derivative liability, there must be some power to administratively direct and control. That necessary power is significantly lacking in the Regents and Commissioner of Education. However, that power was clearly present in the Mayor and Council of the City of Buffalo. They controlled appointments to the Board of Education

and the finances of the school district. They passed legislation to prevent integration of the schools and refused necessary funding. But, the District Court found insufficient evidence to hold them responsible for the segregation of Buffalo's schools. If derivative liability for segregation can exist, it is the city administration, not the State defendants, who are so liable.

POINT II

THE EVIDENCE PRESENTED AS TO RESPONSIBILITY OF THESE DEFENDANTS FOR HOUSING DISCRIMINATION IS IRRELEVANT TO THE ISSUES OF SCHOOL SEGREGATION RAISED IN THE COMPLAINT IN THIS ACTION. IN ANY EVENT, NEW YORK STATE HAS LONG BEEN IN THE FOREFRONT OF LEGISLATION AND ACTION TO ELIMINATE UNCONSTITUTIONAL HOUSING SEGREGATION. THE STATE HAS DONE MORE THAN THAT WHICH IS CONSTITUTIONALLY REQUIRED OF IT IN ELIMINATING PRIVATE AS WELL AS PUBLIC DISCRIMINATION IN HOUSING.

Plaintiffs-appellees allege that segregated housing in Buffalo has been caused by Federal, State and City action (Br., Point IV). It should initially be observed that no Federal agency is a party-defendant and that, in any event, the Federal acts complained of are too remote in time and unconnected with the City of Buffalo. Indeed, the bulk of the testimony as to housing discrimination falls generally in the category of past history, rather than contemporaneous practice. The remaining testimony shows no State liability for segregative housing practices, mostly private, in the city and no reason for holding the State defendants either primarily or derivatively liable on this basis for the segregated status of Buffalo schools.

A. The housing testimony is irrelevant and should be disregarded.

Initially, it is the contention of the State defendants that all of the testimony as to housing segregation in the City of Buffalo is irrelevant. The objections of defendants' attorneys to its introduction should have been sustained or the evidence stricken at the close of the testimony for failure to connect it to school segregation in accordance with the guidelines established by the Courts in Milliken v. Bradley (418 U.S. 717 [1974]). In its decision, the Supreme Court of the United States pointed out that the only State responsibility for segregation found by the District Court was in the area of school construction and site selection (pp. 727-728). The Court's opinion then footnoted the following (p. 728):

"The District Court briefly alluded to the possibility that the State, along with private persons, had caused, in part, the housing patterns of the Detroit metropolitan area which, in turn, produced the predominantly white and predominantly Negro neighborhoods that characterize Detroit:

"'It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community - as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, i.e., racially and economically harmonious. The conditions created continue.'

338 F. Supp., at 587.

"Thus, the District Court concluded, 'The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation.' 338 F. Supp., at 593.

"The Court of Appeals, however, expressly noted that:

"In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation.' 484 F. 2d, at 242.

Accordingly, in its present posture, the case does not present any question concerning possible state housing violations."

We submit to this Court that the position of the Court of Appeals in Milliken was correct and consideration of the housing testimony is neither necessary nor relevant to a decision on the issues in this action.

B. The State of New York, by legislation and administrative action, has taken all steps which are constitutionally required to eliminate public and private discrimination in housing.

Plaintiffs' exhibit 171 contains a reference to Jones v. Mayer Co. (392 U.S. 409 [1968]) in which the Supreme Court of the United States held that the 1866 Civil Rights Act (42 U.S.C. § 1982) prohibits "all discrimination against Negroes in the sale or rental of property - discrimination by private owners as well as discrimination by public authorities" (392 U.S., p. 421). That decision did not, however, render such private discrimination

unconstitutional or impose upon either the Federal or State governments the obligation to enforce the statute. Just as the Fifteenth Amendment did not render unconstitutional the use of literacy as a qualification for voting (Lassiter v. Northhampton Election Board, 360 U.S. 45 [1959]), but did confer jurisdiction on Congress to ban such tests by statute (Katzenbach v. Morgan, 384 U.S. 641 [1966]), so too the Thirteenth Amendment did not declare private discrimination in the sale or rental of property to be unconstitutional, but, as held in the Jones case, supra, did confer jurisdiction on Congress to ban such discrimination. This distinction is made clear in the Court's references to the application of the United States Civil Rights Act of 1968. The Court held section 1982 to be enforceable through individual civil actions by aggrieved persons but not to extend to the broad administrative enforcement procedures of the 1968 Act (392 U.S., pp. 416-417). Nor did the Court hold invalid the provision of the 1968 Act which exempts owner-occupied dwellings with four families or less from the discrimination prohibition of that Act. Had the Court intended its decision to be construed as a constitutional bar to private discrimination in housing or to impose a duty upon Federal or State officials to prevent all housing discrimination it would not have limited the remedy under section 1982 to individual actions but would have incorporated it into the broad administrative remedies of the 1968 Civil Rights Act.

Private discrimination in the sale or rental of housing has not been held to be unconstitutional and consequently no constitutional duty is imposed upon either State or local officials to prevent it or to take affirmative action to desegregate housing. However, New York State has long been in the forefront of legislative and administrative action to end discrimination in housing, employment, education and other areas of social and economic opportunity.

Chapter 118 of the Laws of 1945 (the "Quinn-Ives Law") enacted the first State law prohibiting discrimination in employment and providing machinery for enforcement of the prohibitions. In fact, it preceded any Federal law to that effect (see, Public Papers of Governor Thomas E. Dewey [1945], p. 413).

In 1955, Governor Harriman, in his Annual Message to the Legislature, recommended the extension of the jurisdiction of the State Commission Against Discrimination to public housing and publicly-assisted private housing (Public Papers of Governor Averill Harriman [1955], p. 34). The Metcalf-Baker Act (chapter 340 of the Laws of 1955) enacted that year prohibited discrimination in the sale or rental of publicly-assisted housing, constructed after July 1, 1950 with the assistance of Federal or State moneys, tax exemptions or credits. Additionally, chapter 341 of the Laws of 1955 amended the Civil Rights Law, § 18-b to prohibit discrimination in multiple dwellings constructed after July 1, 1955 with the assistance of loans guaranteed or insured

by any Federal or State agency and also prohibited discrimination in the sale of housing in developments of ten or more houses with Federal or State guarantees or assistance. Multiple dwellings were defined by chapter 563 of the Laws of 1956 to include buildings occupied by three or more families. That act also added the prohibitions of section 18-b to section 292 of the Executive Law, thus placing the enforcement within the administrative powers of the Commission Against Discrimination, rather than requiring individual actions by those aggrieved.

In 1961, the Legislature acted to prohibit discrimination by real estate brokers in the sale or rental of housing accommodations in multiple dwellings and in developments of ten or more homes (L. 1961, ch. 414). In 1963, the New York Legislature enacted legislation extending the ban against private discrimination to all housing, except owner-occupied one and two-family homes, and the prohibition against discrimination by real estate brokers in the sale or rental of any housing (L. 1963, ch. 481).

It was not until 1968 that Congress enacted legislation prohibiting discrimination in the sale or rental of housing accommodations with the exception of owner-occupied dwellings of four families or less, a law not even as broad in its coverage as New York's earlier statute.

Thus, when Yerby Dixon was decided by the Commissioner of Education in 1965, New York's anti-discrimination laws relative to housing were as strong as any in the Nation and no State law or practice permitted housing discrimination in violation of those laws.

In 1969, New York enacted legislation to prohibit the practice of "blockbusting" by real estate brokers, enforceable by the State Human Rights Commission (name changed by L. 1962, ch. 165) (Executive Law § 296[3-b], added by L. 1969, ch. 1070).

In recommending changes in the Executive Law to eliminate the exemption of one and two-family owner-occupied property, the Governor's Committee to Review New York Laws and Procedures in the Area of Human Rights also acknowledged the reasons for the exemption, stating (Report to Governor Nelson A. Rockefeller, March 1968, p. 27):

"The Committee is not unaware of the reasons for the exemption in the present law. It is based on the closeness of the relationship necessarily existing between families in two-family houses and the question as to whether a person who has an absolute right to refuse to rent to any number of persons of his own race, creed, color or national origin for any reason whatsoever without accountability should have to explain or justify his reason for not renting to someone of another race, creed, color or national origin."

The Committee, thus, recognized the practical problems involved in the recommended change, a change recommended for policy reasons not constitutional ones. While the particular recommendations of the Committee relative to one and two-family housing were not adopted by the Legislature, others were.

New York's statutory efforts to meet and exceed the requirements of the Constitution in eliminating discrimination do not present a Reitman (Reitman v. Mulkey, 387 U.S. 369 [1967]) situation to this Court in which the State has become significantly involved

in invidious discrimination. It has not deprived citizens of pre-existing rights to integrated housing, but has instead extended those rights and created enforcement machinery for those rights.

The only question remaining is, therefore, whether State agencies charged with enforcement of the statutory prohibitions have failed or refused to fulfill their obligations.

Much of plaintiffs' testimony and evidence relative to housing discrimination relates to policies and practices in the 1930's and early 1940's. We submit that any evidence as to events prior to the landmark decision of the Supreme Court of the United States in Shelley v. Kraemer (334 U.S. 1 [1948]) is irrelevant. Consequently, plaintiffs' exhibits containing pages from a 1935 FHA manual are irrelevant, as is the testimony relative to early practices of the Buffalo Housing Authority.

Insofar as action by the State is concerned, an argument raised by plaintiffs, the question is limited to whether the State by its agencies or employees failed or refused to fulfill their obligations under the Executive or Civil Rights Laws. The Buffalo Housing Authority is not a State agency; it is a public corporation, independent of the State, serving municipal purposes. Thus, testimony as to the Buffalo Housing Authority is irrelevant as to State responsibility.

It is to be noted, however, that plaintiffs' witness Einach testified that after 1946 transfers were permitted from black

to white housing projects and vice-versa, breaking the segregation barrier in municipal housing almost 30 years ago (A. II, p. 719).* In fact, Einach testified that in 1947 or 1948, the State Commission Against Discrimination held a meeting with the Authority and the Authority agreed to make transfers and new assignments in order to effectively integrate public housing in Buffalo (R. IV, p. 168).* He also testified that the projects are "pretty well integrated" today (R. IV, p. 169), and that when he was employed by the Division for Human Rights, ending in 1973, there were few complaints as to discrimination in public housing; most of the complaints relating to discrimination were in private housing (R. IV, p. 171).

Plaintiffs' witness Service, a black real estate broker, testified to discrimination in the sale and rental of housing and particularly efforts to exclude black real estate brokers and their clients from white neighborhoods, mostly in the 1950's and early 1960's, prior to the enactment of New York's major anti-discrimination legislation in the housing area (A. II, p. 73)).

When asked on cross-examination whether he had ever filed complaints with any State agency concerning the alleged acts of discrimination, Service stated that prior to the Metcalf-Baker Act (1955), he had no legal basis for a complaint; that afterwards he had filed complaints with the Buffalo Real Estate Board (an

* Numbers preceded by "A" indicate volume and page of the joint appendix. Numbers preceded by "R" indicate volume and page of the transcript of testimony not printed as part of the joint appendix.

organization of brokers, not a State agency) and that in 1965 he had filed complaints with the State Commission Against Discrimination against two brokers (R. VI, p. 82). Both brokers were censured as a result and directed to discontinue discriminatory action (R. VI, pp. 82-83).

Service's testimony, therefore, proves only that where complaints of violation of State statute were made, the State agency did fulfill its obligations.

Plaintiffs also presented as a witness, Anthony Dutton, a lawyer associated with H.O.M.E. (Housing Opportunities Made Equal), who testified that most rental housing in Buffalo is owner-occupied, one and two-family houses, and thus not subject to the State Human Rights Act A. II, p. 828). He also testified, without naming specific occasions, that the Human Rights Commission did not effectively use its investigating powers (A.II, p. 828).

Plaintiffs' witness Sloane testified only as to general national policies of FHA and other national institutions without any specific reference to New York State. When asked as to causes of concentrations of minority members in specific areas of the City of Buffalo, Sloane stated that he could not say since he did not know Buffalo, and plaintiffs' attorney then stated that Sloane was not purported to be an expert on the City of Buffalo (R. VI, p. 50). Thus, Sloane's testimony is totally irrelevant on the question of either New York State or Buffalo responsibility for housing segregation and should be disregarded by this Court.

As a witness, the State defendants called Robert Young, an investigator for the New York State Department of State, who handles all of the complaints in the Buffalo area relative to discrimination by real estate brokers and other licensees of the Department (R. X, pp. 7-8). He testified that the last year in which his office had received any complaints of discrimination by real estate brokers was in 1969 (R. X, pp. 8-9). Since 1966, when he first became employed by the Department, Young had had 23 complaints involving brokers (R. X, p. 9), about 11 or 12 of which were found to be unfounded (R. X, p. 9), 9 real estate brokers either lost their licenses or their licenses were suspended for periods of time and fines levied (R. X, pp. 9-10). (See, e.g., Kamper v. Dept. of State of the State of New York, 22 N.Y.2d 690 [1968].) He also testified that every complaint received was investigated (R. X, p. 10). He further testified that, while the Department did not usually seek out violations but acted upon specific complaints, if a newspaper ad indicated reason to believe there might be discrimination involved, he would initiate an investigation and that he had done so on two or three occasions (R. X, pp. 12-13).

The State defendants also called Franklin Bundy, the regional director of the Division for Human Rights, which region includes Buffalo. Selecting a time period at random, he testified that in the period from January 1, 1969 to June 30, 1969 the Division took in 21 complaints relative to housing discrimination (R. X, pp. 19-20). He stated that when a complaint is received preference is given to

housing complaints to try to close them within 48 hours because the status of a housing accommodation could change in a very short period of time (R. X, pp. 20-21). A telegram is sent to the respondent notifying him of the complaint; the complaint is investigated within a day and an attempt made to get an agreement from the respondent that he will not dispose of the housing accommodation until the investigation is completed (R. X, p. 21). If he does not agree to hold the accommodation, a petition is presented to the Supreme Court of the State of New York, on a show cause order, for an injunction delaying disposition of the property until the case is closed (R. X, p. 22).

Of the 20 cases initiated in the first six months of 1969, probable cause was found in 16, thus housing was acquired for the complainant in those cases or he received some satisfaction and compensatory damages were assessed in all the cases (R. X, p. 24).

In the statistical reporting period of the Division closest in time to the trial, July 1, 1973 through December 31, 1973, only four housing complaints were received (R. X, p. 24). Relative to the reduction in complaints, Bundy testified (R. X, pp. 25-26):

"First of all, we have a very active public relations responsibility through myself in the area and there have been several organizations who have been instrumental in reducing discrimination in housing. Principally, the organization is HOME, Housing Opportunities Made Equal. There are other areas such as the State, - New York, - the City of Buffalo Commission for Human Rights. They have been active in this area and I think it is because of the concerned effort of all agencies that such figures have been reduced."

"Q. Do you often cooperate with HOME?
A. Very much so, yes.

"Q. Would you give an instance or example?
A. I could give you a general reference. I can't cite you a case from memory.

"Q. Yes, sir. A. But there has been a rapport that has been established through the community with HOME to the point that many times an individual who feels he has been discriminated against in housing will contact HOME, tell them what the circumstances are. HOME will then send out an individual member of their organization to test such housing complaint and then bring the complaint in to our office, offer testimony in behalf of such complainant in regard to what they know and what is within their personal knowledge."

On cross-examination, he testified that on complaints relative to owner-occupied two-family housing, the State Division, although it does not have jurisdiction, would advise complainants that such discrimination does fall within the purview of the Federal Law (presumably the 1866 Civil Rights Act) (R. X, pp. 30-31).

Bundy also testified on cross-examination that even as to such complaints the Division would investigate to make certain that it did not, in fact, have jurisdiction (R. X, pp. 31-32).

Although Bundy testified that the State agency did not test the housing market to determine if discrimination exists without receiving a complaint, organizations such as H.O.M.E. did and the State Division accepts those investigations in support of complaints (R. X, pp. 38-39).

There is insufficient evidence in the record to support allegations of State participation in or responsibility for illegal or unconstitutional housing discrimination in the Buffalo area.

Consequently, those allegations of the complaint should have been dismissed and this Court should disregard such testimony as did the Court of Appeals in Milliken, supra.

CONCLUSION

THE ORDERS APPEALED FROM SHOULD
BE REVERSED AND THE COMPLAINT
DISMISSED AS TO THE STATE DEFENDANTS.

Dated: October 20, 1977

Respectfully submitted,

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